UNITED
NATIONS

A

General Assembly

Distr.
GENERAL

A/CN.9/450
6 April 1998

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW
Thirty-first session
New York, 1-12 June 1998

POSSIBLE ADDITION TO THE UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE: DRAFT PROVISION ON INCORPORATION BY REFERENCE

Note by the Secretariat

1. At various stages in the preparation of the UNCITRAL Model Law on Electronic Commerce (hereinafter referred to as "the Model Law"), it was suggested that the text should contain a provision to the effect of ensuring that certain terms and conditions that might be incorporated in a data message by means of a mere reference would be recognized as having the same degree of legal effectiveness as if they had been fully stated in the text of the data message. That effect was generally referred to as "incorporation by reference" (for earlier discussion of the issue of incorporation by reference by the Commission, by the Working Group on Electronic Commerce and in notes prepared by the Secretariat, see A/52/17, paras. 248-250; A/51/17, paras. 222-223; A/CN.9/446, paras. 14-24; A/CN.9/437, paras. 151-155; A/CN.9/421, paras. 109 and 114; A/CN.9/407, paras. 100-105 and 117; A/CN.9/406, paras. 90 and 178-179; A/CN.9/360, paras. 90-95; A/CN.9/350, paras. 95-96; A/CN.9/333, paras. 66-68; A/CN.9/WG.IV/WP.74; WP. 71, paras 77-93; WP.69, paras. 30, 53, 59-60 and 91; WP.66; WP.65; WP.55, para. 109-113; and WP.53, paras. 77-78).

2. At its thirtieth session (1997), the Commission had before it the report of the Working Group on the work of its thirty-first session (A/CN.9/437). With respect to the issue of incorporation by reference, the Working Group concluded that no further study by the Secretariat was needed, since the fundamental issues were well known and it was clear that many aspects of battle-of-forms and adhesion contracts would need to be left to applicable national laws for reasons involving, for example, consumer protection and other public-policy considerations. The Working Group was of the opinion that the issue should be dealt with as the first substantive item on its agenda, at the beginning of its thirty-second session (see

A/CN.9/437, para. 155). The Commission endorsed the conclusions reached by the Working Group. 1/

3. At its thirty-second session, the Working Group discussed the issue of incorporation by reference on the basis of various texts that were proposed as possible additions to the Model Law. That discussion is recorded in the report on the Working Group on the work of its thirty-second session (A/CN.9/446, paras. 14-23), together with the text of the various proposals that were considered by the Working Group.

4. At the close of that discussion, the Working Group adopted the text of the draft provision reproduced in Annex I to this note, decided that it should be presented to the Commission for review and possible insertion as a new article *5bis* of the Model Law, and requested the Secretariat to prepare an explanatory note to be added to the Guide to Enactment of the Model Law (A/CN.9/446, para. 24). A draft text prepared pursuant to that decision for possible insertion in the Guide to Enactment of the Model Law is set forth in Annex II to this note.

5. It may be noted that the text adopted by the Working Group embodies a minimalist approach to the issue of incorporation by reference. Consistent with the earlier deliberations of the Working Group (see above, para. 2), it does not attempt to achieve any substantial unification of the existing rules of domestic law regarding that issue. Instead, it restates in the context of incorporation by reference the general principle of non-discrimination embodied in article 5 of the Model Law.

6. The text adopted by the Working Group is aimed at facilitating incorporation by reference in electronic commerce by removing the uncertainty that might prevail in certain jurisdictions as to whether the rules applicable to traditional paper-based incorporation by reference also apply in an electronic environment. Another aim of the provision is to make it clear that consumer-protection or other national or international law of a mandatory nature (e.g., rules protecting weaker parties in the context of contracts of adhesion) should not be interfered with.

7. As currently drafted, the text presupposes a certain degree of familiarity of enacting States with the concept of incorporation by reference. However, although the expression "incorporation by reference" has been used consistently by the Working Group as a concise way of referring to a complex range of legal and factual situations, it might not convey the same meaning in all enacting States. With a view to reducing the difficulties that may arise in the interpretation of the text, the Commission may wish to consider whether more descriptive language might be used. For example, consistent with the negative formulation adopted by the Working Group, language along the following lines might be considered:

> "Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is not contained in the data message purported to give rise to such legal effect, but is merely referred to in that data message."

1/ Official Records of the General Assembly, Fifty-second Session, Supplement No. 17 (A/52/17), paras. 249-251.

Annex I

Draft provision possibly to be added to
the UNCITRAL Model Law on Electronic Commerce

(as adopted by the Working Group on Electronic Commerce at its thirty-second session)

Article 5*bis*. Incorporation by reference

Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is incorporated by reference in a data message.

Annex II

Draft section possibly to be inserted in the Guide to Enactment
of the UNCITRAL Model Law on Electronic Commerce

(prepared by the Secretariat pursuant to a decision made by the Working Group on Electronic Commerce at its thirty-second session)

Article 5*bis*. Incorporation by reference

Article 5*bis* is intended to provide guidance as to how legislation aimed at facilitating the use of electronic commerce might deal with the situation where certain terms and conditions, although not stated in full but merely referred to in a data message, might need to be recognized as having the same degree of legal effectiveness as if they had been fully stated in the text of that data message. Such recognition is acceptable under the laws of many States with respect to conventional paper communications, usually with some rules of law providing safeguards, for example rules on consumer protection. The expression "incorporation by reference" is often used as a concise means of describing situations where a document refers generically to provisions which are detailed elsewhere, rather than reproducing them in full.

In an electronic environment, incorporation by reference is often regarded as essential to widespread use of electronic data interchange (EDI), electronic mail, digital certificates and other forms of electronic commerce. For example, electronic communications are typically structured in such a way that large numbers of messages are exchanged, with each message containing brief information, and relying much more frequently than paper documents on reference to information accessible elsewhere. In electronic communications, practitioners should not be placed under the burdensome obligation to overload their data messages with quantities of free text when they can take advantage of extrinsic sources of information, such as databases, code lists or glossaries, by making use of abbreviations, codes and other references to such information.

Standards for incorporating data messages by reference into other data messages may also be essential to the use of public key certificates, because these certificates are generally brief records with rigidly prescribed contents that are finite in size. The trusted third party which issues the certificate, however, is likely to require the inclusion of relevant contractual terms limiting its liability. The scope, purpose and effect of a certificate in commercial practice, therefore, would be ambiguous and uncertain without external terms being incorporated by reference. This is the case especially in the context of international communications involving diverse parties who follow varied trade practices and customs.

The establishment of standards for incorporating data messages by reference into other data messages is critical to the growth of a computer-based trade infrastructure. Without the legal certainty fostered by such standards, there might be a significant risk that the application of

traditional tests for determining the enforceability of terms that seek to be incorporated by reference might be ineffective when applied to corresponding electronic commerce terms because of the differences between traditional and electronic commerce mechanisms.

While electronic commerce relies heavily on the mechanism of incorporation by reference, the accessibility of the full text of the information being referred to may be considerably improved by the use of electronic communications. For example, a message may have embedded in it uniform resource locators (URLs), which direct the reader to the referenced document. Such URLs can provide "hypertext links" allowing the reader to simply direct a pointing device (such as a mouse) on a key word associated with a URL. The referenced text would then be displayed. In assessing the accessibility of the referenced text, factors to be considered may include: availability (hours of operation of the repository and ease of access); cost of access; integrity (verification of content, authentication of sender, and mechanism for communication error correction); and the extent to which that term is subject to later amendment (notice of updates; notice of policy of amendment).

One aim of article 5*bis* is to facilitate incorporation by reference in an electronic context by removing the uncertainty prevailing in many jurisdictions as to whether the provisions dealing with traditional incorporation by reference are applicable to incorporation by reference in an electronic environment. However, in enacting article 5*bis*, attention should be given to avoid introducing more restrictive requirements with respect to incorporation by reference in electronic commerce than might already apply in paper-based trade.

Another aim of the provision is to recognize that consumer-protection or other national or international law of a mandatory nature (e.g., rules protecting weaker parties in the context of contracts of adhesion) should not be interfered with. That result could also be achieved by validating incorporation by reference in an electronic environment "to the extent permitted by law", or by listing the rules of law that remain unaffected by article 5*bis*. For example, in a number of jurisdictions, existing rules of mandatory law only validate incorporation by reference provided that the following three conditions are met: (a) the reference clause should be inserted in the data message; (b) the document being referred to, e.g., general terms and conditions, should actually be known to the party against whom the reference document might be relied upon; and (c) the reference document should be accepted, in addition to being known, by that party.

References

A/53/17, paras. -- ;
A/CN.9/446, paras. 14-24;
A/CN.9/WG.IV/WP.74;
A/52/17, paras. 248-250;
A/CN.9/437, paras. 151-155;
A/CN.9/WP. 71, paras 77-93;
A/51/17, paras. 222-223;
A/CN.9/421, paras. 109 and 114;
WP.69, paras. 30, 53, 59-60 and 91;
A/CN.9/407, paras. 100-105 and 117;
A/CN.9/WG.IV/WP.66;
A/CN.9/WG.IV/WP.65;
A/CN.9/406, paras. 90 and 178-179;
A/CN.9/WG.IV/WP.55, para. 109-113;
A/CN.9/360, paras. 90-95;
A/CN.9/WG.IV/WP.53, paras. 77-78;
A/CN.9/350, paras. 95-96;
A/CN.9/333, paras. 66-68.